United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kenneth Jones, Appellant vs. United States of America	No. 18410
Willis Campbell, Jr., Appellant vs. United States of America	No. 18411

7756

APPEAL IN FORMA PAUPERIS FROM JUDGMENT
OF CONVICTION BY THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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June, 1964
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*Cases chiefly relied upon are marked by asterisks.

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STATEMENT OF QUESTIONS PRESENTED

1. In a trial upon indictments for housebreaking and petit larceny of a safe, should the Court direct an acquittal if the Government fails to prove:

(a) that the safe was stolen,

(b) that the accused were ever in possession of the safe or any of its contents,

(c) that the accused entered the premises in question on or about the date set forth in the indictment, and,

(d) that the accused entered the premises in question with the intent to steal property of another.

2. In a trial upon indictments for housebreaking and petit larceny, when the accused may be subject to deprivation of his liberty for as long as sixteen years, should the Court instruct the jury as to the meaning of "reasonable doubt" in the following terms:

> "... but, if after such impartial comparison and consideration of all the evidence and giving due consideration to presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendants' guilt, or either of their guilt, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then as to such defendants you have no reasonable doubt." (Emphasis supplied)

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APPEAL IN FORMA PAUPERIS FROM JUDGMENT
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JOINT BRIEF FOR APPELLANTS

Jurisdictional Statement

Appellants were tried on December 17 and 18, 1963, by the United States District Court for the District of Columbia pursuant to a Grand Jury indictment filed in open court on September 24, 1963, charging appellants with violation of Sections 1801 and 2202 of Title 22 of the District of Columbia Code (housebreaking and larceny). The situs of the alleged crimes was in the District of Columbia.

Appellants were found guilty after trial and on January 10, 1964, sentenced to four to twelve years on Count 1 and one year on Count 2, the latter sentence to run concurrently with the sentence imposed in Count 1. Appellants filed notices of appeal in time and applied for leave to proceed upon appeal in forma pauperis. By orders issued January 20, 1964, the District Court ordered that they be authorized to proceed on appeal without prepayment of costs and with appointed counsel, and directed preparation of the transcript at government expense.

By orders issued February 18, 1964, this Court appointed the undersigned to represent the individual Appellants in this case and ordered sua sponte that these cases be consolidated for all purposes.

Statement of Case

The Government alleges that Appellants on the night of August 24-25, 1963, entered the premises of Revere Furniture & Equipment Company, occupied jointly with a subsidiary, Kogod & Dubb Furniture Company, located at 950 Upshur Street, N. W., at the intersection of Upshur Street and Kansas Avenue (hereinafter referred to as the "Revere and Kogod" premises), and that they stole from those premises a safe in the value of $30.00, which was later found on the shore of the south lagoon near the Potomac River broken open and with its contents strewn about. The Government attempted

to prove its case essentially through one eyewitness who testified that he saw the Appellants at the scene of the alleged crime about midnight.

The Appellants testified and presented witnesses on their behalf to show that they were not at the scene of the crime but were in specific places removed at a considerable distance therefrom all during the night in question.

Statutes Involved

Section 1801 of Title 22 of the District of Columbia Code provides in pertinent part:

> "Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not ... with intent to break and carry away any part thereof or any fixture or anything attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

Section 2202 of Title 22 of the District of Columbia Code provides in pertinent part:

> "Whoever shall feloniously take and carry away any property of value of less than $100, including those savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both ..."

The two counts of the indictment under which Appellants were tried and convicted are set out hereinbelow at page 7.

Statement of Points

1. The Government failed to prove that a safe belonging to Revere Furniture & Equipment Company was stolen on or about August 25, 1963, as charged.

With respect to Point 1, Appellants desire the Court to read the following pages of the reporter's transcript: Tr 12-18.

2. The Government failed to prove that Appellants were ever in possession of the said safe or of any of its contents.

In support of Point 2, Appellants desire the Court to read the following pages of the reporter's transcript: Tr 27-28, 35-36.

3. The Government did not prove that Appellants entered the premises of Revere Furniture & Equipment Company on or about August 25, 1963.

With respect to Point 3, Appellants desire the Court to read the following pages of the reporter's transcript: Tr 25, 27-28, 35-36, 75-77.

4. The Government failed to prove that Appellants entered the premises in question at the time specified with the intent to steal the property of another.

With respect to Point 4, Appellants desire the Court to read the pages in the reporter's transcript set out under Points 1, 2 and 3 above.

5. The standards by which a jury should weigh a decision as to whether proof has been adequate beyond a reasonable doubt should be more weighty than that upon which jurors would be willing to act in the more weighty and important matters relating to their personal affairs.

With respect to Point 5, Appellants desire the Court to read page 200 in the reporter's transcript.

Summary of Argument

The Government failed to prove that the premises in question were feloniously entered upon or that the safe was stolen therefrom. In short, no corpus delecti has been proved. Further, taking the Government's evidence at its face value, the Government failed to prove that Appellants entered the premises in question or were ever in possession of the safe. The evidence upon which Appellants were convicted never rises above the dignity of speculation, suspicion and surmise.

By introducing an inadequate standard of judgment from the world of the jurors' private affairs, the Court provided a confusing dilution of the strict legal standard of proof of guilt "beyond a reasonable doubt" which the Government must meet in a criminal case.

Argument

Upon completion of the Government's case, Court-appointed counsel for each of the defendants moved the

Court for a directed verdict of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. Both motions were denied. (Tr 82) These motions were renewed upon completion of the case for the defendants, and again denied by the Court. (Tr 171)

We respectfully submit that taking the view of the evidence most favorable to the Government, the verdict must be reversed because there is not substantial evidence to support it. Campbell v. United States, 115 U.S. App. D.C. 30, 316 F. 2d 681 (1963).

It appears to us that upon an objective consideration of the evidence any reasonable man must necessarily have had reasonable doubt as to defendants' participation in the crimes alleged. Therefore, the District Court should have granted the motions for judgment of acquittal. Scott v. United States, 98 U.S. App. D.C. 105, 107, 232 F. 2d 362, 364 (1956).

Assuming arguendo that defendants had not presented alibis through their own testimony and that of supporting witnesses which placed them far from the scene of the alleged crimes (Tr 92-155), a careful analysis of the record demonstrates that the Government failed to prove that the alleged crimes actually occurred "on or about August 25, 1963," as charged, or that Appellants committed such crimes.

The basic vice throughout this entire case is that the Government's proof never rises above the level of suspicion. This Court's observation in Cooper v. United States, 94 U.S. App. D. C. 343, 346, 218 F. 2d 39, 42 (1954) may be appropriately applied to the evidence presented by the Government in the circumstances of this case:

> "...Such evidence might raise a question in a reasonable man's mind. But that is not enough. Guilt, according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And, unless that result is possible on the evidence, the judge must not let the jury act; he must not let it act on what would necessarily be only surmise and conjecture, without evidence."

Appellants were found guilty on the following two counts of the indictment.

> "On or about August 25, 1963, within the District of Columbia, Kenneth Jones and Willis Campbell, Jr. entered the store of Revere Furniture and Equipment Co., a body corporate, with intent to steal the property of another.
>
> "Second Count:
>
> "On or about August 25, 1963, within the District of Columbia, Kenneth Jones and Willis Campbell, Jr. stole the property of Revere Furniture and Equipment Co., a body corporate, of the value of about $30.00 consisting of one safe of the value of $30.00."

These are the only charges on which Appellants were tried. The lawfulness of their conviction must be judged by determining whether the Government proved beyond a reasonable doubt that the Appellants committed the crimes alleged in

the indictment. We respectfully submit that the Government failed to meet this standard.

(1) The Government failed to prove that the housebreaking and larceny occurred, or that they occurred on or about August 25, 1963.

(a) The Government failed to prove the said safe was stolen or, if stolen, that the crime occurred on or about the date alleged in the indictment.

The only property alleged in this case to have been stolen is an old safe having a value of $30. The safe was recovered in damaged condition, but there is no allegation that any of its contents were taken away. Yet all of the Government's case is premised on the assumption that the safe was taken around midnight on the night of August 24-25, 1963.

We submit that there is no evidence of record which supports any charge that the said safe was taken from the Revere and Kogod premises "on or about August 25, 1963". There was no evidence as to when the safe might have been removed from the premises.

Government Witness Ryan, Assistant Secretary and Office Manager of Revere Furniture & Equipment Company and its subsidiary, Kogod & Dubb Furniture Company testified that upon his arrival on the premises of the Revere and Kogod Companies on Monday morning (August 27) he found that a small safe, the property of Revere, "that we had in the accounting office was missing". (Tr 15) While this

witness testified as to the condition of the doors and windows of the premises of Revere and Kogod when he left them about 4 P.M. on Saturday, August 24, 1963 (Tr 14), he did not testify that the said safe was then on the premises.

The Government's case does not rule out the possibility that the management of Revere and Kogod consented to the removal of the safe, or that the safe was removed prior to closing of the premises about 4 P.M. on Saturday, August 24, 1963. One can only speculate as to the circumstances of the safe's removal; the time, the means by which, by whom, and with what intent it was taken. This is borne out from a reading of the testimony of all of the Government witnesses.

Government Witness Herath of the Prince Georges County Police testified that he found the safe in a damaged condition on the shore of the south lagoon near the Potomac River (Tr 49). He further testified that "the safe had been in the water overnight." (Tr 52) But this does not rule out the possibility that the safe had been away from the premises of Revere and Kogod for a much longer period. Witness Herath's testimony raises suspicions that a theft had occurred, but it fails to provide any probative support for the indictment under which Appellants were convicted.

Government Witness Meyerhoffer, of the Detective Division, Safe Squad, Metropolitan Police Department, entered the premises of Revere and Kogod on Sunday, August 25, 1963 at approximately 10:00 A.M. (Tr 70) Some unidentified person showed him a spot in the first floor office and told him that a safe was there "and it appeared that a safe had been placed in that position." (Tr 71) But the detective did not testify of his own knowledge that the safe was stolen. Nor did he testify as to when the safe was taken from the Revere and Kogod premises.

(b) No felonious entry by Appellants has been proved.

Only if we assume arguendo what the Government has failed to prove, namely, that the safe was stolen on or about August 25, 1963, does it become necessary to discuss that part of Count 1 of the indictment which charges that Appellants "entered the store of Revere Furniture and Equipment Co. ..."

The premises of Revere allegedly entered by Appellants is on the southwest corner of Upshur Street and Kansas Avenue, N. W. Moving west of the Revere and Kogod premises along the south side of Upshur Street one passes an alley, then the Hot Shoppes Commissary, a driveway, and finally Royal Motors on the corner of Upshur and Thirteenth Street. (Tr 20-21)

Government Witness Nowlin, a security guard for the Hot Shoppes Commissary, testified that on August 24, 1963, "at approximately 11:30 at night, going into midnight", he noticed two men walking up and down Upshur Street. (Tr 21) Then he noticed a Buckingham Supermarket Volkswagen truck in front of Royal Motors (Tr 22) which Defendant Jones had borrowed earlier on Saturday with the consent of the owner. (Tr 60) There is a conflict of evidence as to when Jones returned the truck.[1/]

The two men passed about two feet from Nowlin, going towards Thirteenth Street, and he identified them in Court as the Appellants. (Tr 22-24) Nowlin went upstairs in the Commissary to watch from a window. He testified that the Appellants returned and sat in the Buckingham truck for ten or fifteen minutes. Then he saw them leave the truck, walk along Upshur and go down the alley between the Revere and Kogod premises and Hot Shoppes. He states that he took another Hot Shoppes employee and went to see where the

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1/ Jones testified in his own defense that he returned the truck to the vicinity of Buckingham Supermarket about 6:00 P.M. Saturday evening (Tr 95-96). One of the owners of Buckingham Supermarket testified for the Government that he had a search made for the truck about 10:00 A.M. Sunday and it could not be found (Tr 61). He further testified that Jones said on Monday morning that he had not returned the truck because of taking something to the dump late Sunday or early Monday (Tr 62). The Government Witness admitted that the truck might have been returned on Saturday night and he might not have known of it. (Tr 65-66)

Appellants went. He could not see them in the alley or on the premises of Revere and Kogod. (Tr 25) Nowlin returned to his second floor post. He testified that after fifteen or twenty minutes defendant Jones returned to the Supermarket truck and started to drive "up Kansas Avenue". Nowlin says at that point he came downstairs and stood behind a Hot Shoppes ice cream truck parked in front of the Commissary. (Tr 26) He says he saw the truck drive up to the side entrance of Revere and Kogod on Upshur Street. He saw one of the defendants (he couldn't remember which) in the entrance way of the Revere and Kogod store on Kansas Avenue. (Tr 27) Later he saw the truck with its side doors open and two men "working, or doing something" in the truck. The truck drove off. Nowlin walked up to the Revere and Kogod store and noticed the side door was open. He got another Hot Shoppes employee (not a witness in the case) to verify this; called Number 10 Precinct "and the police arrived and they started an investigation from that". (Tr 29)

In her opening statement, the Government prosecutrix told the jury as to what Witness Nowlin would testify:

> "and ultimately the evidence will show you that he observed them back the truck, a Volkswagen truck, up against the side door of the store that was burglarized, the store that was broken into. He observed one of them [the defendants] come out from the doorway of that store. He observed them apparently working in or loading something into their Volkswagen truck". (Tr 9) (Emphasis supplied)

Witness Nowlin actually testified:

> "--well, before this--I don't know which one of the two--but one of the two was in the entrance way of Kogod & Dubb door there on Kansas Avenue..." (Tr 27) (Emphasis supplied)

The record shows that the Revere and Kogod store had a door at Kansas Avenue and Upshur and another on Upshur. (Tr 30) The side door, the one found open by Nowlin, was the one on Upshur. (Tr 28, 30)

The prosecutrix was not satisfied with witness Nowlin's response. She pressed the point:

> "Q Now, you observed one of the defendants coming out of the side door way, you're talking about?
>
> A I don't know whether he was coming out. He was in the vicinity of the side door." (Tr 27-28)

Witness Nowlin did not testify on direct that he saw anyone leave the store or load anything into the truck. On redirect, the prosecutrix asked:

> "Q Now, sir, when you observed a person coming out of that entranceway and then the activity, the working or locading activity in the truck, where were you at that time?
>
> A Well, I didn't say --
>
> MR. STERNBERG (Counsel for Defendant Jones):
>
> Your Honor, I must object to the form of the question.
>
> THE COURT: We will strike that question and the jury will disregard it. I do not remember any testimony about any loading activity." (Tr 35-36)

Thus, on three separate occasions (Tr 9, 27-28, 35-36) during a relatively short trial, Government counsel insinuated allegations of essential facts, crucial elements in the proof that a crime of housebreaking had been committed by these Appellants, that were never testified to by any witness. It takes no large imagination to conclude that these repeated references by the Assistant United States Attorney to the fact that one of these Appellants came out of the store and that Appellants were engaged in a loading activity with the truck had a substantial effect in persuading the jurors as to the guilt of the accused.

There is no evidence whatsoever that Appellants entered the Revere and Kogod store. No one saw them go in or come out. No fingerprints were found on the forced alley window through which entry was allegedly obtained. (Tr 75) Nor can they be connected with the store by the safe, as no fingerprints were found on the safe or on its contents. (Tr 76-77)

It was not proved that anything was removed from the Revere and Kogod store through the side door on Upshur Street which Government Witness Nowlin found open, or through any other door or window.

There was no evidence as to when the side door of Revere and Kogod was opened for the first time. All that the record shows is that the door was closed at 4 P.M. on

August 24 (Tr 14) and found open by Witness Nowlin some eight or nine hours later. Indeed, the Government failed to prove that anyone feloniously entered the building.

(c) No "intent to steal property of another" has been proved.

The only "property of another" within the meaning of Count 1 of the indictment which the Government alleges Appellants intended to steal is the said safe. It is not simply the count on larceny that requires connecting up Appellants with the safe. Both counts, housebreaking and larceny, require such proof. Assuming arguendo that the safe was stolen, the Government has failed utterly to connect Appellants with it. No one ever saw the safe in Appellants' possession. Nor did the Government show by circumstantial evidence that the safe was ever in Appellants' possession.

The Government's key witness denied that he saw Appellants load anything into the truck as we have seen. (Tr 35-36) He saw the doors of the truck open and some activity in the truck, but he did not claim he saw the safe at any time. (Tr 28) No fingerprints were found either on the safe or on any of its contents which would indicate that Appellants were in possession of the safe. The Government doesn't claim that any of the contents of the safe were found on the persons or in the possession of Appellants or had been disposed of by Appellants to third persons.

Having failed to connect Appellants and the safe or the premises of Revere and Kogod by evidence that rises above mere suspicion, the Government has not met the burden of proving beyond a reasonable doubt that Appellants entered those premises with the intent necessary to constitute the crime of housebreaking.

> (2) The level of proof necessary for conviction in a criminal case must be higher than that required to persuade an individual in his actions in personal affairs.

In attempting to provide the jury with guidance as to what constitutes the Government's burden of proof in this proceeding, the District Court relied upon a comparison of the standard of proof "beyond a reasonable doubt" with the standard of evidence which the jurors "would be willing to act upon in the more weighty and important matters relating to your personal affairs". (Tr 200) This language is to be contrasted with the following far more restrictive instruction approved by the Supreme Court in Miles v. United States, 103 U.S. 304, 309 (1880):

> "A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interest."
> (Emphasis supplied)

When it be considered that, for the most part, the more weighty and important matters affecting the private affairs of persons include matters which do not require weighing the retention or loss of personal liberty, it will be appreciated that the juror might well conclude from the Court's advice that he was free to decide against the accused on the basis of evidence which contained a large element of speculation and surmise.

In personal affairs of an economic and financial nature one ordinarily must deal with estimates as to the future trends in that part of the economy which circumscribes each one of us. Decisions in this realm necessarily involve the exercise of judgment in the face of a large number of facts which are unknown and unknowable and beyond the control of the private person making the decision.

In a criminal case, by contrast, the jury is concerned with evidence that occurred in the past. These are facts, knowable and measurable, although the vehicles by which those facts can be made known might be missing from the courtroom or present but operating in a defective manner. The jury is attempting to determine what actually happened. Where, as in this case, the proof presented by the Government is of such inadequate nature as to leave the juror in the position where he must speculate or surmise as to whether a crime occurred, and, if so, when;

if the juror must assume that the suspicious presence of an accused in an area where a crime might have occurred will be sufficient to serve as the basis for a finding of guilt, then the evidence of the Government has not persuaded beyond a reasonable doubt and the Court's instruction quoted above could only serve to confuse the jurors.

"Reasonable doubt" in a man's private affairs involves a degree of doubt as to the motivations of persons, the purposes and practices of complex federal, state and local governments, and as to the facts of the future. Admittedly, decisions can be and are made in that uncertain atmosphere. One might in a colloquial sense say that a person in his more weighty and important personal affairs can and does act in the presence of evidence which permits accession to a certain course of action beyond a reasonable doubt. But this secularization in the court room of a legal term used to define the level of proof imposed on the Government serves to dilute, to the Defendant's harm, whatever the juror is instructed must be the higher level of Government proof requisite to a finding of guilt, and the consequent punishment of the Defendant.

The Court's charge should have been in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act. Holland v. United States, 348 U.S. 121, 140 (1954).

Conclusion

For the reasons set out above, the judgment of the Court below should be reversed and vacated and Appellants released from custody.

Respectfully submitted,

John T. Miller, Jr.
Counsel for Appellant Kenneth Jones
(Appointed by this Court)

Paul F. Interdonato
Counsel for Appellant Willis Campbell, Jr.
(Appointed by this Court)

Washington, D. C.
June, 1964
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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,410

KENNETH JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,411

WILLIS CAMPBELL, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARBARA A. LINDEMANN,
JEROME NELSON,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Whether there was sufficient evidence of appellants' guilt to go to the jury, where the government proved:

a. that a safe was stolen from a store;
b. that a forcible entry had been made through an alley window and that a door which had been locked was found open;
c. that appellants, together with a truck, spent over one hour at the scene, during a time when the offenses could have been perpetrated;
d. that their presence was not an ordinary occurrence, considering the lateness of the hour, the nature of the area, and the truck;
e. that they first spent time walking back and forth on the street and around the store;
f. that they then went into the alley and disappeared for a time;
g. that one then drove the truck up to the store door, where the other stood;
h. that the truck doors were opened and the men worked inside the truck;
i. and that after they drove off, the store door was found to be open.

(2) Whether, assuming that this evidence was inadequate, the verdict may be sustained by reference to the defense cases, including

a. admissions, contradictions, and inconsistencies in appellants' testimony.
b. and inferences to be drawn from false alibis.

(3) Whether there was error in the prosecutor's opening statement and in certain questions propounded by the prosecutor.

(4) Whether the instructions on reasonable doubt constituted plain error.

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,410

KENNETH JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 18,411

WILLIS CAMPBELL, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed on September 24, 1963, both appellants were charged with housebreaking and lar-

ceny in violation of Sections 1801 and 2202 of Title 22 of the District of Columbia Code. On December 17 and 18 of 1963, the appellants were tried before a jury in the District Court (Hart, J.) and found guilty as charged. By judgments and commitments filed on January 10, 1964, both appellants were sentenced to four to twelve years imprisonment on the housebreaking count and to one year's imprisonment on the larceny count—the latter sentence to run concurrently with the former.

The offenses at bar occurred on or about August 25, 1963, at the Revere Furniture and Equipment Company (hereinafter referred to as "the furniture store")—a corporation located at the corner of Upshur Street and Kansas Avenue in the District.

When the office manager of the furniture store left work at 4 p.m. on the afternoon of August 24, 1963, a Saturday, the doors of the store were locked and the store's windows—including a window which overlooked an alley running between the store and a Hot Shoppes Commissary next door—were closed, normal, and unbroken (Tr. 14). At approximately 1 a.m. on August 25, 1963, a security guard at the Commissary ascertained that the "side door", or Upshur Street door, of the furniture company was open (Tr. 28, 30, 33, 42). At 10 a.m. on the same date a detective discovered that the window overlooking the alley and accessible from the alley, had been "forced and entered" (Tr. 70-71). At the same time the detective observed a location in the office where he ascertained that a safe had formerly stood (Tr. 71).

At about 5 p.m. the same day, August 25, a safe which had been taken from the accounting office of the furniture store office was found on the shore of the Potomac River (Tr. 15-16, 49, 55, 73-74), where it had been lying through high tide and low tide or "overnight" (Tr. 52-53). The safe door had been removed and was found "laying to the side"; some of the contents of the safe were found scattered about the beach area (Tr. 49-50).

The principal witness against appellants was Mr. John T. Nowlin, the security guard at the Commissary, who observed their activities on the night in question. Sometime between 11:30 p.m. August 24, 1963 and midnight, Nowlin was seated in a Hot Shoppes truck parked next to the Commissary on the Upshur Street sidewalk (Tr. 21, 32). The portion of Upshur Street involved in this case is bounded by 13th Street on the west and by Kansas Avenue on the east. Moving from west to east along Upshur Street, the location of various buildings is as follows: Royal Motors, the Commissary, and the furniture store. Driveways or alleyways run between Royal Motors and the Commissary and between the Commissary and the furniture store. The furniture store, as noted, is located at the corner of Upshur Street and Kansas Avenue, with a "side door" on the Upshur Street side (Tr. 32-33).

While sitting in the truck Nowlin observed the appellants walking up and down Upshur Street (Tr. 21). "On the third time up," he observed the men walk to Kansas Avenue and make a right on Kansas. Shortly thereafter the two men reappeared, coming around to the side of the Hot Shoppes truck (Tr. 22). This route would be consistent with the appellants' having come back to Upshur Street via the alleyway which ran between the Commissary and the furniture store (Tr. 22).

Next the men both proceeded down Upshur Street, heading west toward 13th Street (Tr. 24). At this point Nowlin left the Hot Shoppes truck and went upstairs to the second floor of the Commissary in order to obtain a better view of appellants' activities (Tr. 24-25). Nowlin saw the appellants enter a Volkswagen truck marked "Buckingham Supermarket" which was parked on the street somewhere to the left of the driveway running between Royal Motors and the Commissary (Tr. 22, 25, 33). It was unusual for such a truck to be in the area (Tr. 26). After sitting in the Volkswagen truck for ten

or fifteen minutes, the appellants then got out and walked on Upshur Street, making a right turn into the alley between the Commissary and the furniture store (Tr. 25). Nowlin then called police to report two suspicious men in the area (Tr. 25). He also went into the alleyway himself and found that he could not see the appellants, either on Commissary property or on the furniture store property (Tr. 25-26). Nowlin then returned to his observation post where, after fifteen or twenty minutes, he saw appellant Jones coming down Upshur Street (Tr. 26). Jones walked on the other side of the street, passed the Volkswagen truck, crossed the street, came to the truck and proceeded to drive it down Upshur Street to the side door of the furniture company (Tr. 26-27, 38-39).[1] The truck driven by Jones was then parked at the Upshur Street door to the furniture store, where one of the appellants was observed "standing in the entrance way" or "in the vicinity" of the door (Tr. 27-28, 30). Nowlin then saw that the side doors of the Volkswagen truck were open and "two men was in there working, or doing something, some activity in the truck" (Tr. 28). He stepped back out of the line of vision and when he could again view the scene, he saw the truck driving away (Tr. 28). He then walked up the street to the furniture store, found that the Upshur Street door was open, and—approximately one hour after he had first called the police when the men walked into the alley—made a second call reporting the matter (Tr. 28-29, 33, 42).

Mr. Greenberg, the owner of the Buckingham Supermarket, where appellant Jones had once been employed, testified that he had arranged with Jones for him to have the Supermarket truck on August 24 in order to cut the owner's grass and that the truck was to be returned that afternoon (Tr. 58, 60). The owner said that in fact the truck was not returned until either late the next night,

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[1] As Jones started to drive down Upshur, Nowlin came downstairs and went outside the Commissary, standing behind the Hot Shoppes truck in order to observe (Tr. 26).

Sunday, the 25th, or sometime on Monday the 26th (Tr. 61). He knew that the truck had not been returned as of 10 a.m. Sunday morning, August 25 (Tr. 65). On Monday, the 26th, Jones told the owner that he had not returned the truck until Sunday night or Monday, explaining that he had taken the truck to "the dump" or saying "something about the dump being around the corner" (Tr. 62, 67).

As to the question of Nowlin's identification of the appellants (Tr. 22-24, 47), there was evidence that when the men first walked by Nowlin they passed within two or three feet and that he greeted Jones, saying "good evening" or words to that effect (Tr. 22, 23, 24, 39). Nowlin further explained that the area in question was lit by several sources: a large sign on the Commissary, street lights, red flourescent lights on the furniture store, and a spotlight which shines into the alley (Tr. 45-47). Finally there was evidence that Nowlin had picked Jones' picture out of a group of eleven photographs shown him by police and that he had picked appellant Campbell out of a lineup composed of five similar men (Tr. 40, 72-73, 79).

Both appellants testified, denying any criminality and asserting that they were elsewhere at the time Nowlin saw them.

Appellant Jones said that on the evening of August 24, 1963 he went to the home of Catherine Chapman, arriving there sometime between 10:30 and 11:30, and stayed there all that night, all the next day (Sunday), and left Monday morning (Tr. 97-98, 112-113). Mrs. Chapman, who was the mother of two of Jones' children, and who admitted that Jones was her boyfriend and that she was in love with him, testified that he came to her home on the night in question just after she had given a baby a 10 p.m. feeding and did not leave until Monday morning (Tr. 87-88, 91-92, 120). Mrs. Chapman could not remember what she had been doing on the Saturday prior to August 24 and as to the Saturday following the 24th, she said

that there was nothing to remember (Tr. 90). When asked again about her memory of the Saturday after the date in question, she stated "I don't keep up with the dates." (Tr. 91).

As to his activities prior to arriving at Mrs. Chapman's home, Jones admitted that he had the Buckingham Supermarket truck that day, but said that he returned it between 6:30 p.m. and 7:30 p.m. after having done some work at the home of Rosenberg—a co-owner of the market (Tr. 93-95, 110). Jones said further that he had been paid by check for the Rosenberg work, that Mr. Greenberg—owner of the market—had "OK'd" the check on Saturday night (August 24), and that it had been cashed by one of the cashiers (Tr. 100). Greenberg testified that he could not recall cashing a check for Jones on that date (Tr. 63).

Jones said that when he returned from the Rosenberg job, he parked the Buckingham truck on Evarts Street, within two blocks of the supermarket; the truck was found Monday morning, parked on 14th Street (Tr. 95-96, 99).

Jones testified further that several Buckingham employees had keys to the truck, including one Heagens who —according to Jones—resembled him quite a bit (Tr. 101-102). Greenberg said that Heagens was shorter and possibly stockier than appellant Jones and did not resemble him (Tr. 66).

After parking the truck, Jones testified that he got into his own car, went to a liquor store, purchased some Vodka and then proceeded to the home of one Sadie Thompson, arriving there sometime between 8:00 p.m. and 8:30 p.m. and leaving at approximately 9:30 p.m. (Tr. 96-97). Later, on cross-examination, Jones stated that he arrived at the Thompson home "before 8:00 o'clock" and left about one hour later (Tr. 112). Sadie Thompson did not testify at the trial.

Jones admitted that he lied to Detective Mayerhoffer as to his whereabouts on the night in question (Tr. 115).

Specifically he admitted having told Mayerhoffer that he was in Waldorf, Maryland on August 24 and had there gotten into a fight (Tr. 115-116). He explained the lie, stating that he told the officer he had been at the house of a girl whom he could not name because she was on public assistance; then after the officer said that "we are going to have her cut off" he told the Waldorf story so as to protect Mrs. Chapman (Tr. 119-120).

Jones admitted that he knew appellant Campbell but said that they did not travel together, although they had played numbers together in the past (Tr. 104, 108).[2]

Finally Jones admitted to four previous convictions: disorderly conduct, 1951; disorderly conduct, 1954; disorderly conduct, 1955; and housebreaking and larceny, 1955 (Tr. 117).

Appellant Campbell testified that from approximately 7 p.m. August 24, 1963 until late in the afternoon of the 25th he was present at his home, giving a house party (Tr. 126-127). He denied having seen appellant Jones on August 24 or 25, and said that he had last seen Jones some two months prior to the incident at bar (Tr. 128). He admitted having known Jones for fifteen or twenty years, but denied having known him for some twenty-seven years; although in a previous trial held in 1962 he had testified under oath that he knew Jones for twenty-seven years (Tr. 136-137).

Campbell admitted to three previous convictions: disorderly conduct, 1958; drunk, 1959; and drunk, 1961 (Tr. 133).

Three witnesses testified on behalf of Campbell, stating that they were at his party on August 24-25 (Tr. 139-140, 145-147, 164-165). One of the witnesses was the brother of appellant Campbell, and on cross-examination he said that the date of the party was August 17 (Tr. 141-143). When asked by defense counsel whether the party occurred on August 17 or August 24, the brother answered: "The

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[2] The court promptly told the jury not to consider the "numbers" matter against Campbell (Tr. 108).

17th I thought it was" (Tr. 144). Another guest at the alleged party was Henry McCoy, who told defense counsel that he was "not quite sure" whether the party had occurred on the 24th, but he thought that was the date because he was sitting in court when the prosecutor had mentioned the date (Tr. 145). Later McCoy said that he had been mistaken when he said he was not quite sure of the date (Tr. 151-152). McCoy could not remember what he was doing on the Saturdays before and after the 24th (Tr. 152). He admitted to four previous convictions: disorderly conduct, twice in 1953; grand larceny, 1958; unemployment compensation violation, 1960 (Tr. 152-153, 154-155). Campbell's final witness admitted that prior to testifying he had a conversation with defense counsel wherein counsel had mentioned the date in question (Tr. 167-168, 169-170). When asked whether counsel had told him that the party occurred on the 24th, the witness said: "I thought that was the date. Truthfully speaking, I can't even remember the date because I didn't know anything about it. I had forgotten it." (Tr. 169).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801, provides in pertinent part:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not * * * with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2202, provides in pertinent part:

> Whoever shall feloniously take and carry away any property of value of less than $100, including things

savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. * * *

SUMMARY OF ARGUMENT

The court properly refused to enter a judgment of acquittal at the close of the government's case. Looking to the evidence as a whole, and extending to the government the benefit of all reasonable inferences, the jury could find that the store in question had been entered by forcing an alley window and that the safe had been removed through a certain door. Further the jury could find that the safe had been taken out just before 1:00 a.m.—at which time the appellants had left the scene and the door, which had been locked, was discovered to have been opened. Since appellants were scouting the area beforehand, were in the alley where entry had been made, took a truck to the door in question and, with the truck doors open, did some work inside the vehicle before leaving, a reasonable man could find guilt beyond a reasonable doubt. The evidence was entirely consistent with guilt and inconsistent with any reasonable hypothesis of innocence.

Assuming, *arguendo*, that the above proof was inadequate, still the verdict may be sustained by reference to evidence which emerged in the course of the appellants' cases. Taking the government's evidence together with inferences arising from various admissions, inconsistencies and contradictions in the defense cases, and further considering inferences arising from false alibi efforts, the convictions should be affirmed.

ARGUMENT

I. The court properly denied appellants' motion for judgment of acquittal made at the close of the government's case-in-chief.

(See Tr. 14-16, 20-28, 30, 32, 33, 42, 49, 52-53, 55, 70-71)

When the office manager left the furniture store at 4:00 p.m. on August 24, all the doors were locked and the windows intact (Tr. 14). At approximately 1:00 a.m. on August 25, one of the store doors was found open; and at 10:00 a.m. that morning it was discovered that a window, accessible from an alley, had been "forced and entered" (Tr. 2, 30, 33, 42, 70-71). A safe which had been taken from the furniture store was discovered on the shore line of the Potomac River at approximately 5:00 p.m. on August 25 (Tr. 49, 55). The officer who found the safe testified that the tide had come in and gone out during the time it was there and that it had been there overnight (Tr. 52-53). Viewing the facts and inferences in the light most favorable to the government, the jury could thus conclude that the safe had been taken sometime between 4:00 p.m. August 24, and the late p.m. hours of the 24th, or the early a.m. hours of the 25th.[3] Further, the jury could reasonably infer from the forced alley window and the door found open at 1:00 a.m., that the safe had been taken sometime at or before that hour and that whoever took it gained entry by the window, subsequently removing the safe through the door.

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[3] While there is no precise testimony to the effect that the safe was in the store when the office manager closed up at 4:00 p.m., still that is the compelling inference to be drawn from all of the facts. The office manager said that "A small safe that we had in the accounting office was missing Monday morning" (Tr. 15). Taking this statement together with the fact that the witness was the manager of the office and would thus have noticed any earlier removal, it is a fair inference that by the testimony quoted, the manager was saying in effect, "The safe that we had in the office when we closed on Saturday was missing Monday morning."

Turning to the remaining evidence the jury could consider that appellants were actively present throughout all of the crucial areas for over an hour, from approximately 11:30 p.m. until approximately 1:00 a.m. (Tr. 21, 42). The jury could first reason that their presence was at the least highly suspicious—since the area is apparently commercial in nature (Tr. 20-21, 32), since the hour was quite late, and since a truck of the type appellants used would not normally be found in the area (Tr. 26). Next, the jury could infer from evidence showing that appellants initially walked back and forth on the street, around the building, and possibly through the alley (Tr. 21-22), that they were scouting the area with some object in mind. Considering that they next sat in their truck for ten or fifteen minutes (Tr. 25), it was not unreasonable to infer that this period of time, having been preceded by all the walking, was spent in planning. Appellants then went into the alley where entry had been forced and disappeared momentarily (Tr. 25-26). When next seen, one appellant walked down the street to the truck, and drove the truck right up to the furniture store door, where the other man was standing (Tr. 26-28). The truck was parked at the curb, adjacent to the store door, and the side doors of the truck were open (Tr. 28). At this point the appellants were working inside the truck; following which they drove off (Tr. 28). Immediately thereafter, the store door, which had been locked earlier, was found open (Tr. 28, 33). Considering all of these facts—coupled with the evidence as to the time of the removal of the safe, the unusual nature of appellants' presence in the area, the apparent previous exploration and planning—the jury could fairly infer that appellants were the persons who forced the alley window, opened the store door, and removed the safe.

Any one fragment of the case might be considered in isolation and explained away; however this court has made it clear that circumstances cannot be so atomized and must be considered as a whole (*Hunt* v. *United*

States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963)). When the whole of the evidence is considered, a different and incriminating pattern appears—a pattern which is absolutely consistent with guilt and which effectively rebuts any reasonable hypothesis of innocence. Indeed appellants have not suggested any such hypothesis of innocence and we are unable to conceive of any theory which would reasonably explain the totality of their activities on the night in question. Accordingly, looking to all of the evidence, and giving the government the benefit of all legitimate inferences,[4] we submit that a reasonable mind could find guilt beyond a reasonable doubt, and that therefore the motion was properly denied.

II. Assuming, *arguendo*, that the government's case inadequately linked appellants to the offense at bar, the falsity of the defense cases may, on the instant facts, be regarded as the basis for an inference of guilt, which—taken together with the government's proof—is sufficient to sustain the verdict.[5]

(Tr. 11, 63, 66, 90-92, 93-95, 96, 97, 99, 101-102, 115-116, 136-137, 141-144, 151-152, 167-170)

An examination of appellants' defenses shows that they were properly rejected by the jury wholly untrue.

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[4] *Thomas* v. *United States*, 93 U.S. App. D.C. 392, 211 F.2d 45 (1954), *cert. denied*, 347 U.S. 969.

[5] Since defendants here elected to proceed with evidence after the government's case had been presented, an appellate court may look to the entire record in assessing the sufficiency of the evidence. *Cephus* v. *United States*, —— U.S. App. D.C. ——, 324 F.2d 893 (1963). See also *United States* v. *White*, 225 F.Supp. 514, 517 fn. 2 (1963, opinion by Youngdahl, J.), decided after *Cephus*. To the extent that such a rule rests upon a "waiver" basis, we note that this case provides express support for waiver. At the very outset, before any evidence had been adduced, both counsel told the court that their clients insisted upon their innocence and refused to consider pleas to lesser offenses (Tr. 11). Consequently it is inferable that both appellants, even before any evidence had been presented, had made an affirmative decision to present their defenses.

As to Jones' alibi, the jury could consider that it was supported only by the testimony of a woman who loved him, who had in fact borne his children, who-although allegedly certain of her activities on August 24—could not remember the events of August 17, and who admitted that "I don't keep up with the dates" (Tr. 90-92, 120). There were further inconsistences, contradictions, unexplained gaps, and admissions which—taken together with the alibi attempt—served to stamp the Jones' defense as utterly false. Jones admitted he lied to officers when first asked his whereabouts on the night in question—in itself a most incriminating fact (Tr. 115-116).[6] Further Jones claimed that he had done work for Rosenberg prior to returning the truck and that Greenberg had been instrumental in cashing a check for that work (Tr. 93-95, 100). Yet Greenberg had no recollection of the check (Tr. 63); indeed the check itself was never produced. Jones said he had parked the truck on Evarts Street; yet it was found in a different location, a fact which Jones did not explain (Tr. 95-96, 99). Further Jones testified that prior to arriving at Mrs. Chapman's, he had spent some time at the home of Sadie Thompson (Tr. 96-97); yet Sadie Thompson never testified. Since she was a person peculiarly within Jones' power of production, it is not unreasonable to infer that had Sadie Thompson testified, she would not support Jones' story of a visit on the night in question.[7] Finally Jones made a spurious attempt to shift the blame to one Heagens, stating that Heagens had a key to the Supermarket truck and that Heagens resembled him (Tr. 101-102). Greenberg, who knew both men, testified on

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[6] See e.g. *Cogdell* v. *United States*, 113 U.S. App. D.C. 219, 222, 307 F.2d 176 (1962), *cert. denied*, 371 U.S. 957; *Rizzo* v. *United States*, 304 F.2d 810, 830 (C.A. 8, 1962), *cert. denied sub nom. Nafie* v. *United States*, 371 U.S. 890; *Stanley* v. *United States*, 245 F.2d 427 (C.A. 6, 1957).

[7] See *e.g. Graves* v. *United States*, 150 U.S. 118, 121 (1893); *Milton* v. *United States*, 71 U.S. App. D.C. 394, 110 F.2d 556 (1940).

the other hand that Heagens bore no resemblance to appellant Jones (Tr. 66). Such an effort to cast suspicion on someone else is a further circumstance probative of guilt.[8]

Turning to appellant Campbell, the record shows that his defense was equally a fabrication. Campbell's alibi—that he was home giving a party on August 24—was "corroborated" by three witnesses, none of whom could even state positively that the party occurred on the date in question. One witness, Campbell's brother, first established the date of the party as the 24th and then changed it to the 17th, saying he thought the 17th was the date (Tr. 141-144). Another witness said he was "not quite sure" of the date, but thought it was the 24th because "I was sitting in court when the DA called the date off" (Tr. 145). This witness, who could not remember what he was doing on Saturdays before and after the 24th, later said the party occurred on the 24th and that he had been mistaken when he said he was not quite sure (Tr. 151-152). Campbell's last witness said "I can't even remember the date because I don't know anything about it" and admitted that prior to his testifying, the date in question had been mentioned by defense counsel (Tr. 167-170). Finally there was evidence that on one of two occasions Campbell had lied under oath. In this trial he admitted having known appellant Jones for some fiteen or twenty years but denied that he had known him for twenty-seven years—despite the fact that he had testified under oath in another trial that he had known Jones for twenty-seven years (Tr. 136-137).

A. Looking to the totality of the appellants' cases, then, there was ample basis for a conclusion by the jury that the defenses were outright fabrications.[9] Such conduct by or at the instance of a defendant in a criminal case is

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[8] *Harris* v. *United States*, 83 U.S. App. D.C. 348, 169 F.2d 887 (1948), *cert. denied*, 335 U.S. 872.

[9] We do not intend to suggest that assigned counsel, who tried the case vigorously and thoroughly, were in any way parties to the fabrication.

generally regarded as a proper foundation for an inference of guilt. See: *Wilson* v. *United States*, 162 U.S. 613, 620-621 (1896) ("a presumption of guilt"); *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 4, 316 F.2d 652 (1963); *Carter* v. *United States*, 194 F.2d 748, 749 (C.A. 5, 1952); *Andrews* v. *United States*, 157 F.2d 723 (C.A. 5, 1946), *cert. denied*, 330 U.S. 821; *Holt* v. *United States*, 272 F.2d 272, 276 (C.A. 9, 1959); *United States* v. *Sahadi*, 292 F.2d 565, 567-568 (C.A. 2, 1961).

The effect of the inference from fabricated evidence is, on the facts of this case, a crucial one. Here the evidence in question was that of alibi; the appellants were falsely claiming that they were never at the furniture store at all. The jury could analyze the false defense—together with proof showing that both men were pacing up and down the street, were in the alley where entry had been made, took a truck up to a door which was found open immediately thereafter, opened the doors of the truck and did something inside—and fairly conclude that the real reason for the fabricated defense was that appellants had perpetrated the offenses charged. We do not argue that a false alibi automatically establishes guilt. We do submit that on the facts of this case, where the government's proof at the very least established highly probative circumstances, the fraudulent defense effort may be taken together with the government's case so as to reflect that case in an incriminating light. In *Hunt* v. *United States*,[10] *supra* it was said by this Court that testimonial falsehood caused certain aspects of the government's case to take on "added importance" and indeed become "persuasive evidence." Here, just as in *Hunt*, the falsity of the defense could well cause the government's proof to take on added importance and become persuasive. Precisely the same reasoning has been applied in several well-

[10] We recognize that the defendant's testimonial lie in *Hunt* was an admitted fact, in distinction to the case at bar. Where, however, as in the instant case, the entire defense is so discredited and fairly reeks of untruth, we see no reason for any different approach.

reasoned decisions by the New York Court of Appeals holding that the imposition of false alibi testimony, while certainly not conclusive evidence, may be considered as lending weight to the government's case. See *People* v. *Leyra*, 1 N.Y. 2d 199, 134 N.E. 2d. 475, 480 (1956) and cases there cited. Specifically that court has held, in a "corroboration" context, that where there is independent evidence of the commission of a crime, a false testimonial denial by a defendant as to his presence at the scene may give rise to an inference that his presence was a guilty one. *People* v. *Deitsch*, 237 N.Y. 300, 142 N.E. 670 (1923); *People* v. *Croes*, 285 N.Y. 279, 34 N.E.2d. 320 (1941).[11] For other decisions upholding the probative effect of a false alibi see: *State* v. *Conley*, 107 Vt. 72, 176 A. 300 (1935); *Tatum* v. *States*, 131 Ala. 32, 31 So. 369 (1902); *Reed* v. *State*, 121 Tex. Cr. 57, 53 S.W. 2d. 50 (1932).[12]

B. Alternatively, an inference of guilt may be reached by another route expressly approved in this jurisdiction—through the inference that a false alibi may be considered as having been inspired by consciousness of guilt. In *Beck* v. *United States*, 78 U.S. App. D.C. 10, 140 F.2d 169 (1943) this Court upheld an instruction which told the jury that if an alibi was false, then it might consider whether the alibi was the product of "consciousness of guilt" or some other cause. Under the authority of *Beck*, then, the false alibis in this case may be regarded as evi-

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[11] Under the New York rule, a mere unsuccessful attempt to establish an alibi is not a basis for inference; apparently there must be additional evidence showing the defense to have been fabricated. *People* v. *Russell*, 266 N.Y. 147, 194 N.E. 65 (1934). The facts in the instant case go beyond a mere unsuccessful attempt at alibi; the myriad of contradictions, inconsistencies, and other defects in appellants' cases serve to stamp them as fabrications.

[12] The courts are not in agreement. For authorities contra, see: *State* v. *Johnson*, 70 S.D. 322, 17 N.W. 2d 345 (1945); *State* v. *Marasco*, 81 Utah 325, 17 P.2d 919 (1933). Illinois has apparently adopted a middle ground whereby a false alibi has certain probative force but not such as to cure an otherwise defective government case. *People* v. *Widmayer*, 402 Ill. 143, 83 N.E. 2d 285 (1948).

dence of appellants consciousness of guilt. Of course a man with a guilty conscience may not always be guilty,[13] yet on the facts of this case—showing appellants at the scene of the crime, apparently spending time in planning, walking in the alley where entry was found to have occurred, pulling a truck up to a door which had been opened, and working inside the truck—the inference of guilt, which may be drawn from evidence of consciousness of guilt, is not only permissible but eminently reasonable.

III. Various other contentions are without merit.

(See Tr. 12, 27-28, 35-36, 172, 198, 200, 207).

In an opening statement the prosecution said, *inter alia*, that witness Nowlin saw an appellant "come out from the doorway" of the store and thereafter saw them "apparently working in or loading something into" the truck (Tr. 12). In fact Nowlin said that one of the appellants was "* * * in the entrance way of the * * * door * * *" (Tr. 27) or "He was in the vicinity of the side door" (Tr. 28). As to the activity in the truck, Rowlin testified that "the two men was in there working, or doing something, some activity in the truck" (Tr. 28). The "doorway" testimony was not materially different from the phrase used in the government opening and the terms of that phrase did not suggest that the appellant had been in the store, but merely that he had been in the doorway. The "loading" statement in the opening was prefaced by the word "apparently" and the activities of appellants were susceptible of being interpreted as apparent loading. In any event, the jury was ultimately told, both by the prosecutor and the trial judge himself, that neither an opening statement nor a closing statement constituted evidence and that the jury's recollection was to control (Tr. 172, 198).[14]

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[13] See opinion of Bazelon, J. in *Miller* v. *United States*, 116 U.S. App. D.C. 45, 49-51, 320 F.2d 767 (1963).

[14] Insofar as any appellant contends that he was harmed by a gap between the government's opening and its proof, it would seem—

Appellant also contends that on two occasions the prosecutor, by means of questions, later insinuated to the jury that one of the appellants had come out of the door and that the appellants were loading the truck (Br. 13-14). The first question clearly involved no such insinuation. The entire question, to which objection was not made, was: "Now, you observed one of the defendants coming out of the side doorway, you're talking about?" (Tr. 27-28). Plainly the government here was merely asking whether or not the witness had seen the man come out of the doorway; and indeed the witness went on to answer, favorably to the defense, that he did not know whether appellant had been coming out. When the prosecutor later asked a question which apparently assumed there had been testimony as to "loading," (Tr. 35-36), both the witness and the court promptly corrected the matter. The court struck the question, told the jury to disregard it and went on to say "I do not remember any testimony about any loading activity" (Tr. 36). In view of the court's clear and prompt action, there could be no real likelihood that the jury somehow still believed there had been testimony as to "loading."

Finally appellants attack that portion of the instructions on "reasonable doubt" wherein the term was defined, *inter alia*, by use of the clause:

> "* * * such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs * * *" (Tr. 200).

The Supreme Court has said that the instruction should be framed in terms of a hesitation to act rather than a willingness to act. *Holland* v. *United States*, 348 U.S. 121, 140 (1954). At the same time, however, the *Holland* Court held that such an instruction does not create any misapprehension, but is merely confusing; and that where

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as this Court has said—that any prejudice would redound only to the government. See *Allen* v. *United States*, 106 U.S. App. D.C. 350, 273 F.2d 85 (1959), *cert. denied*, 363 U.S. 831.

the charge is correct as a whole, the instruction in issue is not reversible error. Here the court defined the term at length, using other phraseology which has long been approved;[15] indeed there is no contention that the reasonable doubt instructions were otherwise incorrect. Moreover the entire matter was one which might have been settled quickly had any objection been made; yet both counsel stated that they had no objections to the court's instructions (Tr. 207). Accordingly, appellants should not now be heard to complain.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[15] See *Miles* v. *United States*, 103 U.S. 304, 309, 312 (1880) as to "moral certainty" and "abiding conviction."

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REPLY BRIEF FOR APPELLANTS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kenneth Jones, Appellant	)	
	)	
vs.	)	No. 18410
	)	
United States of America	)	

Willis Campbell, Jr., Appellant	)	
	)	
vs.	)	No. 18411
	)	
United States of America	)	

APPEAL IN FORMA PAUPERIS FROM JUDGMENT
OF CONVICTION BY THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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July 24, 1964

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APPEAL IN FORMA PAUPERIS FROM JUDGMENT
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STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

1. The corpus delicti cannot be created out of conjecture.

The Government has unsuccessfully attempted in its brief to paper over the failure of the prosecutrix to prove that a safe was stolen from the Revere and Kogod store. So weak is the Government's argument that it has been relegated to a footnote (Govt. Br., p. 10, fn. 3) in which this Court

is asked to accept an argument that the jury could fairly infer from testimony that a safe was missing on Monday morning, that the safe was in fact in the store at the time the store was locked up on Saturday afternoon, and that it had been stolen about midnight on Saturday evening by Appellants. This is not inference; it is speculation and conjecture.

In its statement of the questions presented, the Government asserts that it proved "a. that a safe was stolen from a store". Thereafter the Government refers (Br. p. 10) to a "safe which had been taken from the furniture store", and further (Idem.)

> "the jury could thus conclude that the safe had been taken sometime between 4:00 p.m. August 24, and the late p.m. hours of the 24th, or the early a.m. hours of the 25th."

But it is no crime to take a safe from a store. It may be a crime to take a safe without the permission of its owner.

This Court is not presented with a problem of a conflict of evidence. Indeed there was nothing for the jury to weigh. There is a complete lack of evidence that the safe was stolen, or, if stolen, when the crime occurred. These vital links in the proof are totally missing from the evidence in this case. Certainly no inference favorable to the Government can be drawn from this deficiency.

The testimony of the Government's witnesses is consistent with the hypothesis that the safe had been removed from the store prior to Saturday, August 24. It is also consistent with the hypothesis that the safe when removed was taken with the consent of its owner. Should either of these hypotheses be true, Appellants must be adjudged innocent. When the evidence is consistent with any reasonable hypothesis of innocence, as it is here, a motion to acquit must be granted. This Court stated in Carter v. United States, 102 U.S. App. D.C. 227, 232, 252 F.2d 608, 612-613 (1957):

> "It is not necessary to a verdict of acquittal that on the basis of the facts established a hypothesis of innocence be as likely as one of guilt; any reasonable hypothesis of innocence must be excluded by the facts. ..."

We are not fragmenting or atomizing the evidence in arriving at this conclusion, in the sense found objectionable in Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963). We are simply directing the Court's attention to a fundamental failure of proof of the corpus delicti.

2. The Appellants' alibis justify their acquittal and do not plug the fatal gap in the Government's case.

The Government attempts to bolster an inadequate record by assertions that the verdict may be sustained by inferences arising from various admissions, inconsistencies and contradictions in the defense cases and inferences to be drawn from false alibi efforts.

Confident of their innocence, Appellants took the stand in their own defense. Because they did so, the Government would now have this Court hold that they waived their right to appeal the denial of their motions to acquit upon completion of the Government's case. This Court's warranted uneasiness over the implications of the "waiver" doctrine evidenced in Cephus v. United States, ____ U.S. App. D.C. ____, 324 F.2d 893 (1963) is justified in the light of the Government's suggested reliance upon that rule in the present case.

No manner of analysis of the defendants' cases can fill the void left by the Government's failure to prove the safe was stolen. Instead, by demonstrating that the memories and wits of the defendants and the four witnesses who appeared on their behalf did not measure up under the caustic attack of the prosecutrix, an attempt is made to persuade

this Court that defendants ought to lose their liberty. The Government's burden in criminal cases must be more substantial than this.

The Government's case is based essentially upon a single witness who did not witness the crime but whose testimony placed Appellants at the location of the alleged crime during the hours when it allegedly occurred. The alibis of Appellants placed each of them in different places far from the scene of the crime. Mr. Jones' statements were corroborated by Mrs. Catherine Chapman (Tr. 85); those of Mr. Campbell by his brother (Tr. 138) and two friends (Tr. 144, 164).

The alibi of Mr. Jones is first attacked on the ground that it was supported only by the testimony of a woman who loved him and who in fact had borne his children (Govt. Br. p. 13). From this we must surmise that the Government means that favorable testimony in a criminal case is worthless when given by someone who loves the defendant. Apparently the credibility of testimony is to be placed on a sliding scale, the greatest weight given to the testimony of those who hate the defendant and the least to those who love him. Love would become the necessary ally of dishonesty, perjury, and crime. What a cynical judgment of human character is inherent in the Government's argument!

This Court should not accept such a facile brushing aside of the testimony of a witness who stated that she was with the defendant during the time when the crime allegedly occurred. Mrs. Chapman testified that the defendant, Jones, arrived at her house between 10:00 and 11:00 p.m., a fact which she verified by recalling that she had just finished nursing her child (Tr. 87), a memorable event in the life cycle of a newborn infant. Her testimony is attacked because she could not remember what she did on August 17 or August 31. That she should remember the night of August 24-25 and not what transpired a week before or a week afterwards is not surprising. None of us has the ability to remember events and dates when called to account in the offhand manner employed by the prosecutrix. We need diaries, reference to calendars, time to reflect. But surely one more quickly and easily remembers the events surrounding the arrest of a loved one, of a relation, and his subsequent imprisonment. The weekend of August 24 was one Mrs. Chapman was unlikely to forget. Mr. Jones was arrested and incarcerated on Monday, August 26, because of events that had taken place over that weekend, and has been in prison ever since. This Court can readily appreciate that Mr. Campbell's brother and his friends would likewise have cause to remember the weekend of the alleged crime.

The testimony of Mr. Jones is also criticized on the ground that he did not produce as a witness Miss Sadie Thompson (Govt. Br. p. 13) whom he visited between the hours of 8:00 and 9:30 on Saturday evening, August 24. The purpose of this argument is not obvious. The Government has sought to prove that the crime occurred about midnight. Mrs. Chapman accounted for Mr. Jones' presence at that time. A supporting witness accounting for events which occurred some two and one-half hours earlier is not essential to proof of innocence.

In its recital of inconsistencies and contradictions the Government does not refer to some which occurred during the cross-examination of Mr. Jones by the prosecutrix which were wholly uncalled for and which served unfairly to prejudice the Appellants. In our original brief (Br. pp. 12-14), we showed how the prosecutrix insinuated through argument and leading questions certain crucial allegations as to Appellants' actions which were not supported by the testimony of any witness. We shall not repeat that statement here. Rather we direct the Court's attention to other features of the cross-examination.

On direct, Mr. Jones stated that he finished work at the Rosenberg home at around 5:30 or 6:00 o'clock and

then proceeded to the Buckingham Supermarket where he parked the truck (Tr. 95). The witness did not on direct state the time when he parked the truck. Nonetheless, the prosecutrix interrogated the defendant as follows (Tr. 110-111):

> "Q What time did you allegedly park your truck, sir?
>
> A Oh, gosh, oh, it must have been around perhaps 6:30, 7:00 o'clock or something like that, around something like that. I can't say for sure what time.
>
> Q Did you testify on your direct examination that you parked the truck at 6:00 o'clock?
>
> A Miss, gee gosh, if I said 6:00, give or take a little. I'm not exactly sure of the time.
>
> Q Did you testify on your direct examination that you parked the truck at 6:00 o'clock?
>
> A Is that what I said?
>
> Q Did you say it in this courtroom on your direct examination when your attorney asked you that question?
>
> A I might have, ma'am, but I know it was around that time.
>
> Q Around what time?
>
> A It was around anywhere between 6:00 and 7:00; I know that."

Mr. Jones testified on direct that, after parking the truck, he picked up his own car and then went to a liquor store (Tr. 96). Again he did not state any time

when that occurred. On cross-examination the prosecutrix asserted (Tr. 111):

> "Q And you then told us that you left the liquor store between 6:30 and a quarter of 7:00. You said that a moment ago. Would you be mistaken, sir?"

On direct examination, Mr. Jones stated that he left Miss Sadie Thompson's apartment about 9:30 p.m. and then went to Mrs. Chapman's house (Tr. 97). On cross-examination the prosecutrix asked (Tr. 113):

> "Q When you told us on your direct examination that you arrived there between 9:00 and 9:30, you were mistaken?"
>
> A I wouldn't say that.
>
> Q You just didn't know when you testified whether you were being accurate or not; is that correct?"

and again (Tr. 114):

> "Q Then when you testified on your direct examination that you arrived at Catherine's house some time between 9:00 and 9:30 you were mistaken?"

The witness and his counsel protested that he did not say this.

These brief quotes show how the prosecutrix sought to make out Appellant Jones as a liar by putting in his mouth statements which he did not make and which appeared to create contradictions which might influence the jury. We

can only admit that Mr. Jones, a poorly educated man, was less than a match for the prosecutrix.

We believe that this Court may fairly conclude that the conduct of the prosecution here fell short of the standard defined by the Supreme Court in Berger v. United States, 295 U.S. 78, 88 (1935), where it held that the United States Attorney

> "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Conclusion

As the Appellee has failed to justify the judgment of the Court below, it should be reversed and vacated and Appellants released from custody.

Respectfully submitted,

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